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BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION #1

UM-1-1975

BILLINGS EDUCATION ASSOCIATION,

Petitioner,

vs

FINAL ORDER

BILLINGS SCHOOL DISTRICT #2 of

YELLOWSTONE COUNTY AND BILLINGS HIGH

SCHOOL DISTRICT,

Employer.

\* \* \* \* \*

The BOARD OF PERSONNEL APPEALS, as the Final Order of this Board,  
in the above entitled matter, adopts the Order issued by its hearing  
examiner, Peter O. Maltese, dated April 2, 1976, and the Order issued  
by this Board on June 30, 1976.

Dated this 27th day of January, 1977.

BOARD OF PERSONNEL APPEALS

BY Brent Cromley  
Brent Cromley  
Chairman

BEFORE THE BOARD OF PERSONNEL APPEALS

\* \* \* \* \*

IN THE MATTER OF UNIT CLARIFICATION #1: ) UM-1-1975  
BILLINGS EDUCATION ASSOCIATION )  
Petitioner, )  
BILLINGS SCHOOL DISTRICT #2 OF )  
YELLOWSTONE COUNTY AND BILLINGS HIGH ) ORDER  
SCHOOL DISTRICT, )  
Employer. )

\* \* \* \* \*

DISCUSSION

A petition in the above-entitled matter was filed by both parties. The employer requested a rehearing on the grounds that the Findings of Fact and Determination of Appropriateness as it pertains to the inclusion of substitute teachers, other part-time teachers fails to define the categories, leaving the parties with the inability to determine which teachers, under these categories, are to be included in the bargaining unit; and that in the event an election is called to determine the appropriate bargaining representative, the categories of substitute teachers and other part-time teachers are not defined with sufficient clarity to determine the eligible voters. The employees' petition agreed with the findings of the hearings examiner, but took exception to the election ordered by the hearings examiner.

Both parties presented oral argument on those petitions before this Board on May 10, 1976. After hearing oral argument on the matter and reviewing the record, this Board finds no merit in the argument presented by the employer.

We find, however, that the argument presented by the Billings Education Association to the recommended election well taken.

This Board's rule, MAC 24-3.8(10)-S8089(11)(b), reads:

"(b) After hearing the Board shall issue its determination as to the appropriateness of the

1 clarification or modification petitioned  
2 for. If the clarification or modification  
3 petitioned for is found not to be appropriate  
4 the findings and conclusion shall give specific  
5 reasons therefore. If the clarification or  
6 modification is found to be appropriate the  
7 Board shall schedule an election or pre-election  
8 conference." (emphasis added.)

9 The underlined sentence in the above quoted rule is the direct  
10 cause of the confusion. The sentence requires that whenever a  
11 clarification or modification is found to be appropriate, the  
12 Board shall schedule an election. That procedure is not logical  
13 in this fact situation.

14 The original petition leading to the Findings of Fact and  
15 Determination of Appropriateness in question here was presented to  
16 this Board as a result of a disagreement between the Employer and  
17 B.E.A. as to which positions were included in the bargaining unit.  
18 At no time did the hearing amount to a unit determination. In  
19 light of those facts, it would be absurd to hold an election of  
20 those positions determined to be in the unit, for it was already  
21 determined that they were in the unit. Such election could result  
22 in unwarranted fragmentation of the bargaining unit, defeating the  
23 purpose of the hearing.

24 We therefore must interpret the above quoted rule in question  
25 to be applicable to only those unit clarifications and modifica-  
26 tions in which an election would properly be called for. We can-  
27 not logically interpret the rule to apply to all unit modification  
28 or clarification proceedings. Such an interpretation is in har-  
29 mony with the procedure followed by the National Labor Relations  
30 Board. The only time that Board ever calls an election in a  
31 clarification procedure is when the Board determined that a unit  
32 properly belongs to two appropriate units. (SEE: 3 Kheel, Labor

1 Law S13.06)

2 ORDER

3 1. The Employer's Petition for rehearing is denied.

4 2. That portion of the Findings of Fact and Determination  
5 of Appropriateness recommending an election or pre-election  
6 conference is denied. There shall be no election held in this  
7 matter.

8 DATED: June 30, 1976.

9 BOARD OF PERSONNEL APPEALS

10  
11 BY Brent Cromley  
12 Brent Cromley  
13 Chairman  
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BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION #1:

BILLINGS EDUCATION ASSOCIATION

Petitioner,

BILLINGS SCHOOL DISTRICT #2 OF YELLOWSTONE  
COUNTY AND BILLINGS HIGH SCHOOL DISTRICT,

Employer.

44-1-1975

FINDINGS OF FACT  
AND DETERMINATION OF  
APPROPRIATENESS

\* \* \* \* \*

I. INTRODUCTION

The Billings Education Association affiliated with the Montana Education Association (hereinafter BEA) filed a petition for unit clarification with the Board of Personnel Appeals (hereinafter Board).<sup>1</sup> Billings School District No. 2 and Billings High School District (hereinafter District) filed a response to BEA's petition which was denominated as a "counterproposal." Pursuant to BEA's petition, a hearing was held before me on July 29, 1975, in Billings, Montana. After the hearing, briefs were submitted by both parties.

II. FINDINGS OF FACT

I have considered the entire record in this matter and find as follows:

BEA has been recognized by the District as the exclusive bargaining representative of certain District employees. BEA and the District have had contractual relations for the school year 1974-1975 without benefit of Board certification. However, the unit coverage was challenged during the spring and summer of 1975 when the parties were attempting to negotiate a new collective bargaining agreement.

BEA asserts that all certificated<sup>2</sup> personnel and other professional employees employed by the District should be included in the bargaining unit because some of the employees are performing bargaining unit work, others have been recognized by the District as being in the unit, and others have been specifically included in negotiated agreements between the parties. They

1. The Board of Personnel Appeals' procedure for unit clarification and modification is set out in MAC 24-3.8(10)-S8080 et seq.

2. Teacher certificates are issued to qualified personnel by the Montana Superintendent of Public Instruction. Section 75-6006, R.C.M. 1947.

object to the District's attempts to limit the unit to only certificated teachers thereby excluding all other educational professionals.

The District, on the other hand, contends that certain of its employees should be excluded from the unit because of the operation of a new collective bargaining law which was made applicable to various of its employees on July 1, 1975.<sup>3</sup> Basically, the District contends that many of the employees BEA insists should be included in the bargaining unit are supervisory employees and/or management officials,<sup>4</sup> or do not share a community of interest<sup>5</sup> with bargaining unit employees.

During the hearing, the parties entered into stipulations as to the employees who should be excluded from or included in the bargaining unit and thus greatly reduced the categories of employees being disputed by the parties. Those categories are as detailed below.<sup>6</sup>

3. Amendments to the Montana Public Employees Collective Bargaining Act (Title 59, Chapter 16, R.C.M. 1947) places high school and elementary teachers under that Act. Formerly, these teachers' collective negotiations were governed by the Professional Negotiations Act for Teachers. This Act was repealed by the same bill which amended the Montana Public Employees Collective Bargaining Act. Mont. Laws 1975, c. 117, sections 1 and 3.

4. The Montana Public Employees Collective Bargaining Act excludes supervisory employees and management officials from the Act's definition of public employee and thus from the coverage of the Act. Section 59-1602(2). The Professional Negotiations Act for Teachers did not, however, exclude such employees from bargaining units. In fact, it expressly allowed principals (who would presumably meet the definition of supervisory employee or management official in most instances) to elect to be included in the appropriate unit.

5. I use the phrase community of interest in a generic sense: It encompasses all of the factors listed in section 59-1606(2) for the determination of an appropriate bargaining unit.

6. In determining whether the disputed categories of District employees should be excluded from or included in the bargaining unit, I shall consider, among other things, the community of interest factors set out in section 59-1602 (2). By so doing, I am following established National Labor Relations Board practice. See *Kennecott Copper Corp.*, 176 NLRB No. 13, 71 LRRM 1188 (1969), and *Western Cartridge Co.*, 134 NLRB 67, 49 LRRM 1098 (1961). The Board of Personnel Appeals has often looked to the precedent of the NLRB for guidance--especially where, as here, novel questions are being considered. I shall also consider whether or not the employee is a supervisory employee or a management official. It seems clear to me that the legislature intended that these types of employees be excluded from operation of the Montana Public Employees Collective Bargaining Act.

1 Ten Month Assistant Principals

2 BEA argues that ten month assistant principals should be included in the  
3 bargaining unit here because they have been previously included. The District  
4 contends that ten month assistant principals are supervisory employees and  
5 management officials and should therefore be excluded from the bargaining  
6 unit.<sup>7</sup>

7 There is evidence that ten month assistant principals who were formerly  
8 classified under the job title deans--were included previously in the bargain-  
9 ing unit. In BEA exhibit number one, a copy of the collective bargaining  
10 agreement between the District and the BEA for school year 1974-1975, the  
11 District recognized BEA "as the exclusive and sole representative for  
12 collective negotiations for all certificated personnel employed by the  
13 (District)..." Ten month assistant principals were and are certificated  
14 personnel. Moreover, page twenty-eight of BEA exhibit number one sets forth  
15 the extra stipend due deans.<sup>8</sup>

16 Nonetheless, there is evidence which supports the District's contentions  
17 that the ten month assistant principals are supervisory employees or manage-  
18 ment officials. The ten month assistant principals' primary responsibilities  
19 are to supervise student extra-curricular activities, and to oversee student  
20 discipline and attendance matters. In the supervision of student extra-  
21 curricular activities, the ten month assistant principals are called upon  
22 to supervise and to evaluate certificated personnel members of the bargaining  
23 unit.

24 The ten month assistant principal is third in the chain of command at the  
25 school to which he is assigned, below the principal and twelve month assistant  
26 principal. Both the principal and twelve month assistant principal have been

27 *7. I have not given any weight to the job descriptions of the ten*  
28 *month principals which were introduced into evidence by the District.*  
29 *These job descriptions were for the 1975-1976 school year and therefore*  
30 *were, at the time of the hearing, prospective in nature. Rather, I have*  
31 *relied on the testimony of witnesses as to what the duties and responsi-*  
32 *bilities of the ten month assistant principals were and are.*

33 *8. The District produced witnesses who testified that the Dean's*  
inclusion in the agreement was inadvertent. However, this is of no conse-  
quence for the Montana Supreme Court has held as follows:

"\*\*\*The rule of statute, followed mandatorily throughout the body of  
contract law, is that the written contract supercedes all prior negotiations  
and precludes evidence that alters, contradicts or amends its written terms."  
Merritt v. Merritt, --Mont.--, 526 P. 2d 1375, 1379 (1974); citing Heckman  
and Shell v. Wilson, 158 Mont. 47, 487 P. 2d 1141

1 excluded from the bargaining unit by stipulation of the parties. According  
2 to testimony adduced at the hearing, the essential difference between the ten  
3 month and the twelve month principal is the number of months they work. When  
4 the principal and the twelve month assistant principal are absent from the  
5 school simultaneously, the ten month assistant principal assumes the super-  
6 visory and managerial responsibilities of the principal. At one school,  
7 both the principal and the twelve month assistant principal were simultan-  
8 eously absent six to eight times during the 1974-1975 school year, at times  
9 for as long as two days.

10 The ten month assistant principal attends the meetings of the "management  
11 team." The management team consists of District administrative and supervisory  
12 personnel and makes management decisions. As part of the management team,  
13 the ten month assistant principal may be involved in recommending the transfer,  
14 layoff, or recall of other district employees who are part of BEA's bargaining  
15 unit.<sup>9</sup> He also attends administrative council meetings. This council reviews  
16 school policies and administrative plans and formulates changes with regard  
17 to them.

18 The ten month assistant principal may also be involved in the hiring of  
19 prospective teachers and made recommendations which were given great weight  
20 by the administration as to whether the interviewee should be hired.

21 Accordingly, I conclude that ten month assistant principals are super-  
22 visory employees and management officials. They should, therefore, be ex-  
23 cluded from the bargaining unit.

#### 24 Migrant Program Teachers

25 The District objects to the inclusion of the migrant program teachers  
26 into the bargaining unit. The migrant program is an educational program for  
27 the children of migrant workers. The program operates at various Montana  
28 locations from three to five weeks during the months of July and August. The  
29

30 <sup>9</sup> In evaluating the assistant principals' supervisory responsibilities,  
31 I have not considered their supervision over District employees who are not  
32 included in BEA's bargaining unit, such as study hall aides and parking lot  
attendants.



1 District acts as the fiscal agent of the program for the Montana Department  
2 of Public Instruction and performs accounting and payroll functions. The  
3 District is not the employer of the migrant program teacher. They do not,  
4 for example, hire the teachers. Accordingly, the migrant program teachers  
5 should be excluded from the bargaining unit.

#### 6 Home School Coordinator

7 The District objects to the inclusion of the home school coordinator  
8 into the bargaining unit. There has been no showing that the coordinator  
9 shares a community of interest with other BEA bargaining unit members. In  
10 fact, the available evidence, scant as it is, establishes the opposite.  
11 The coordinator is a federally funded position which is part of an Indian  
12 education program. He is not a teacher. He is not certificated nor is he  
13 required to have a college degree. Rather, he works with Indian children on  
14 such matters as truancy. The coordinator has never been included in the  
15 bargaining unit in the past. Accordingly, the home school coordinator  
16 should be excluded from the bargaining unit.

#### 17 Part Time Job Categories

18 BEA contends that certain part time employees should be included in the  
19 bargaining unit because they are performing bargaining unit work or have  
20 been included in the collective bargaining agreement between the parties.  
21 Specifically, these employees are substitute teachers, homebound teachers,  
22 summer school teachers, curriculum workers, and other part time teachers.<sup>10</sup>  
23 The District argues that these employees should be excluded because they  
24 do not share a community of interest with other employees of the bargaining  
25 unit.  
26

27  
28 10. By "other part time teachers," I am referring to those teachers who  
29 are employed for less than a full academic year when there is a larger  
30 student enrollment than expected in particular courses and additional teachers  
31 are employed to meet the increased enrollment. BEA argues in their brief  
32 that reading tutors are part time teachers and perform bargaining unit work  
and should also be included in the bargaining unit. After closely examining  
the record, however, I can find no evidence whatsoever which relates to  
reading tutors. BEA, as the petitioner in this matter, has the burden of proof  
to demonstrate that reading tutors should be included in the bargaining unit.  
Since BEA has failed to do this, I shall not recommend that the reading tutors  
be included in the bargaining unit.

1 First of all, I believe that these employees were formerly included in  
2 the bargaining unit because they were included in the collective bargaining  
3 agreement between the parties. In that agreement, as I noted earlier, the  
4 District recognized BEA as the exclusive bargaining representative for all  
5 certificated personnel employed by the District. Most, if not all, of these  
6 part time employees are certificated teachers. Moreover, article nine of the  
7 collective bargaining agreement sets out the salary of part time teachers.

8 These employees, in my opinion, share a community of interest with other  
9 employees of the bargaining unit.<sup>11</sup> They perform common work tasks. The  
10 part time employees are involved in the teaching of students and, in the case  
11 of the curriculum worker, the revision of curriculums, as are other bargain-  
12 ing unit employees. Both the part time and other bargaining unit employees  
13 possess similar educational backgrounds. They are supervised by the same  
14 personnel. For the most part, they work in the same physical plants. A  
15 large degree of interchange exists between the part time and other employees  
16 of the bargaining unit. Likewise, their work functions are integrated.

17 These factors, in my mind, outweigh such factors as the difference in  
18 the wage and benefit programs and time worked between the part time employees  
19 and other employees of the bargaining unit.

20  
21 These factors, in my mind, outweigh such factors as the difference in  
22 the wage and benefit programs and time worked between the part time employees  
23 and other bargaining unit employees.

#### 24 Full Time Job Categories

25 Three disputed positions remain to be determined. These positions are  
26 all full time job categories. BEA contends that the employees filling these  
27 positions should be included in the bargaining unit because they are perform-  
28 ing bargaining unit work. The disputed positions are elementary school

29  
30 <sup>11</sup> In fact, teachers of the bargaining unit are often hired to work  
31 as summer school teachers and curriculum workers during various vacation  
32 periods.

1 librarians, also called library aides, audio-visual technicians, and instruc-  
2 tional material center technicians. The District argues that these employees  
3 are not covered by the collective bargaining agreement and that such em-  
4 ployees do not share a community of interest with bargaining unit employees.

5 The District's arguments must be sustained with regard to the audio-  
6 visual technicians and instructional material center technicians. These  
7 employees are not required to be certified, and for the most part they are  
8 not.<sup>12</sup>

9 The audio-visual technicians' training is in the field of electronics.  
10 They work with and repair audio-visual machines. They are not involved in  
11 classroom teaching although they occasionally instruct students in the use  
12 of audio-visual equipment. One witness likened the audio-visual technicians  
13 to television repairman and said that they are not essentially educators.  
14 The instructional material center technicians, likewise, do not basically  
15 perform a teaching function. They have limited contact with students.  
16 Rather they work with duplicating tape, transparencies and sound materials.  
17 They are involved with printing and offset printing. They repair equipment  
18 and they back up the audio-visual technicians.

19 Accordingly, I conclude that audio-visual technicians and instructional  
20 material center technicians do not share a community of interest with other  
21 bargaining unit members and should, therefore, be excluded from the bargain-  
22 ing unit.

23 BEA contends that elementary school librarians should also be included  
24 in the bargaining unit because they are doing bargaining unit work. The  
25 District argues that these employees do not share a community of interest  
26 with other bargaining unit members. I disagree. The elementary school lib-  
27 rarians, like teachers, have extensive student contact. They teach the  
28 students classes in library usage. They help students select books. They

29 <sup>12.</sup> Testimony during the hearing indicated that only one audio-visual  
30 technician and one instructional material center technician were certificated  
31 teachers.  
32

1 assist the students in research projects. They provide reading hours and  
2 other enrichment projects for students. Elementary school librarians, like  
3 teachers, are supervised by the same personnel. They have a great deal of  
4 interchange with teachers. They work in the same physical plant and assist  
5 the teacher in her functions. For example, one teacher testified that the  
6 elementary school librarian helped her develop her reading curriculum.  
7 Elementary school librarians, like teachers, are mostly certified personnel  
8 and consequently have educational backgrounds which are similar to teachers.

9 Accordingly, I conclude that elementary school librarians share a  
10 community of interest with other bargaining unit employees and should be  
11 included in the bargaining unit.

#### 12 DETERMINATION

13 Based on the foregoing, I conclude that the inclusion of substitute  
14 teachers, homebound teachers, summer school teachers, curriculum workers,  
15 "other part time teachers," and elementary school librarians into the bar-  
16 gaining unit represented by BEA is an appropriate clarification. I also  
17 conclude that the inclusion of ten month principals, migrant program teachers,  
18 home school coordinator, reading tutors, audio-visual technicians, and  
19 instructional material center technicians into the bargaining unit repres-  
20 ented by BEA is an inappropriate clarification.

21 With regard to the appropriate clarification, I recommend that the  
22 Board of Personnel Appeals schedule an election or pre-election conference  
23 in conformity with MAC 24-3.8(10)-S8089.

24 Dated this 2nd day of April, 1976.

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26   
27 Peter O. Maltese  
28 Hearing Examiner  
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